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April 25, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: July 28, 2004

Case No.: TIA-0149

XXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Applicant's illnesses were not related to his work at a DOE facility. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the appeal should be denied.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part

852 (the Physician Panel Rule). The OWA was responsible for this program.<sup>1</sup>

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a physician panel, a negative determination by a physician panel that was accepted by the OWA, and a final decision by the OWA not to accept a physician panel determination in favor of an applicant. The instant appeal was filed pursuant to that section. The Applicant sought review of a negative determination by a physician panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D.<sup>2</sup> Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, the receipt of a positive DOL Subpart B award establishes the required nexus between the claimed illness and the Applicant's DOE employment.<sup>3</sup> Subpart E also provides that all Subpart D claims will be considered as Subpart E claims. OHA continues to process appeals until the DOL commences Subpart E administration.

### *B. Procedural Background*

The Applicant was employed as a laborer at the DOE's Paducah Gaseous Diffusion plant (the plant) for approximately sixteen years, from 1977 to 1981 and 1993 to present.

The Applicant filed an application with the OWA, requesting physician panel review of three claims -- stomach ulcers, asbestos-related lung disease, and hearing loss. The Applicant asserted that his illnesses were the result of exposure to hazardous chemicals and radiation at the plant.

The Physician Panel rendered a negative determination on each illness. The Panel found evidence of stomach ulcers or asbestos-related lung disease. The Panel

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<sup>1</sup> See OWA website, available at <http://www.eh.doe.gov/advocacy/index.html>

<sup>2</sup> Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004).

<sup>3</sup> See *id.* § 3675.

determined that the Applicant's hearing loss was attributable to noise exposure, not exposure to toxic substances. The OWA accepted the Physician Panel's negative determination, and the Applicant filed the instant appeal.

The Applicant disagrees with the Panel's determinations regarding asbestos-related lung disease and hearing loss. The Applicant states that he believes his lung problems are the result of asbestosis exposure at DOE and that his hearing loss was the result of noise exposure at DOE.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to a toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12. The Rule required that the Panel's determination be based on "whether it is at least as likely as not that exposure to a toxic substance" at DOE "was a significant factor in aggravating, contributing to or causing the illness." *Id.* § 852.8.

The Applicant has not demonstrated Panel error. The Applicant's belief that his lung problems are the result of asbestos exposure is merely a disagreement with the Panel's medical opinion that he has no evidence of asbestos-related lung illness. The Applicant's belief that his hearing loss is attributable to noise is not disputed. Noise is not a toxic substance and, therefore, it is outside the scope of the Rule.<sup>4</sup>

As the foregoing indicates, the record shows that the Physician Panel complied with the Physician Panel Rule, i.e., it addressed the claimed illnesses, made a determination, and explained the reasoning for its conclusion. The arguments presented in the appeal are merely disagreements with the Panel's medical judgment or the scope of the Rule and, therefore, do not indicate error. Accordingly, the appeal should be denied.

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<sup>4</sup> See 42 U.S.C. § 7385o(d)(3); 67 Fed. Reg. 52843. See also, e.g., *Worker Appeal*, Case No. TIA-0013, 28 DOE ¶ 80,262 (2003).

In compliance with Subpart E, this claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the Department of Labor's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0149 be, and hereby is, denied.
- (2) The denial pertains only to the DOE claim and not to the DOL's review of this claim under Subpart E.
- (3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: April 25, 2005